Supreme Court, U.S.
FILED
FEB 16 1994
OFFICE OF THE CLERK

No. 93-1158

In The

Supreme Court of the United States

October Term, 1993

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,

Petitioner,

TRANS WORLD ASSURANCE COMPANY, DONALD S. FLETCHER, and FLETCHER INSURANCE ASSOCIATES,

v.

EMMETT R. DAVIS, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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STATEMENT OF THE CASE

The proceedings below addressed a multi-state, fraudulent insurance sales scheme, perpetrated by several insurance agents and insurance companies in the late 1970s and through most of the 1980s. Established in the late 1970s by Donald S. Fletcher, Neil McKelvie, and others, this sales scheme came to be known as the "tax

and insurance program." It operated out of northern California and was targeted at middle-income working people across the United States.

This insurance sales scheme was marketed through hundreds of "tax seminars," presented in scores of United States cities and towns via an organization that came to be known as Fletcher Insurance Associates ("FIA").[1] At those tax seminars, Donald Fletcher and other insurance agents promised prospective clients that income tax liability could be eliminated lawfully and tax audit protection ("prepaid legal care") would be provided to those client investors who would join the program by (1) buying large amounts of life insurance; (2) involving themselves in a home-based business; and (3) turning their tax affairs over to the insurance agents. The insurance agents, along with their purported tax "experts," prepared new IRS W-4 forms[2] and income tax returns for these clients and managed the clients' relationships with the Internal Revenue Service.

The income tax returns were prepared improperly,[3] and, after several years, the Internal Revenue Service and

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[1] This organization was first called The Fletcher-McKelvie Group (1978-1980). Its name later changed to Fletcher-McKelvie Insurance Associates (1980-1983), and, eventually, it became known as Fletcher Insurance Associates or FIA (1983 onward).

[2] In preparing new IRS W-4 forms, the insurance agents increased tax withholding allowances, thereby effecting reductions in federal income tax withholdings from employee paychecks. Those withholding reductions yielded immediate funds used to pay the insurance companies for the required life insurance policies.

[3] The advertised "tax experts" under contract with FIA to prepare these returns were actually a collection of insurance

state tax authorities conducted audits of the returns. When the lengthy audit process was completed, the Internal Revenue Service and state authorities assessed the Respondents and other victims with hundreds of thousands of dollars in additional taxes, penalties, and interest.

Participation in this scheme by Petitioner Mutual Life Insurance Company of New York ("MONY") began in 1980, when the company named Donald Fletcher and several of Fletcher's collaborators as agents for MONY and provided office space for FIA. Fletcher and his collaborators had been fired in mid-1980 by New York Life for the fraudulent activities attendant to this same tax and insurance program. MONY's embrace of Fletcher and this sales scheme came after a MONY-employed attorney had conducted a lengthy investigation on Fletcher, FIA, and the tax seminars and submitted a written report, concluding that the scheme was illegal and a "fast-track hustle" but, nonetheless, could be an "excellent marketing tool." MONY's executives disregarded these warnings, opting to make Fletcher and six of his collaborators MONY insurance agents. MONY then assisted Fletcher and FIA in marketing this sales scheme on a near-nationwide basis.

MONY was well aware that the scheme involved fraudulent preparation of tax returns by the purported tax "experts," and MONY took steps to advance the scheme. When one California attorney/tax preparer

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agents, a disbarred lawyer, and others who formed different business entities each year to avoid detection by the Internal Revenue Service.

balked at the fraudulent tax preparation methods and began to warn MONY policyholders about the false tax information they had received, MONY's executives reacted with threats against the tax preparer, demanding that he cease those communications with policyholders. MONY threatened to have this tax preparer disbarred as an attorney if he continued warning policyholders.

MONY's executives and even its board chairman received numerous complaints and warnings about this program. These complaints came from policyholders across the nation who had been defrauded and also from MONY agents. One MONY agent, who had serious misgivings about the tax and insurance program, approached her agency manager, provided him with a tape recording of one of the tax seminars, and voiced her concerns about the fraud. When those concerns were relayed to MONY's Regional Vice-President, his only response about the program was: " 'Well, it's working all over the place. It's great. We're – we're – it's making us money.' "

Misstatements in MONY's Petition.

There are several misstatements of fact which appear in MONY's Petition.

1. First, MONY's statements that "Fletcher Insurance Associates" became a part of the MONY corporate entity are incorrect and contrary to the record. FIA was an unincorporated association of numerous individuals – a *de facto* partnership. FIA had its own board of directors and was a company separately registered with the State of California. It issued its own business cards and office

stationery and published its own newsletters. This organization conducted tax seminars and agent training seminars across the nation. It entered into written and oral contracts with tax preparation operations. The record shows that FIA was never merged with MONY; nor was it ever purchased or otherwise acquired by MONY. MONY never listed FIA as its asset and, otherwise, never identified FIA as a part of MONY. In a document issued by MONY's Regional Vice-President, MONY certified that this organization was a business entity separate from MONY. The MONY certification identified FIA as a "partnership," whose principals were Donald S. Fletcher and Neil McKelvie. The document identified FIA as being registered with the California Insurance Department and as a separate business entity to which MONY provided financial and non-financial assistance.

FIA existed as a separate entity before its principals (Donald Fletcher and Neil McKelvie) were affiliated with MONY; it existed separately during the time of their affiliation with MONY; and it maintained a separate existence after they ceased their affiliation with MONY. Indeed, throughout the trial below, MONY vigorously argued and presented testimony that Donald Fletcher and Fletcher Insurance Associates were separate and distinct from MONY. To that end, in closing argument MONY's lawyer underscored the evidence that FIA and MONY were distinct entities, as he told the jury during his closing statement: "Fletcher was CEO of some organization – it wasn't Mutual of New York."

2. MONY's second misstatement of fact is its assertion that "the respondents knowingly filed exaggerated and misleading tax returns with the Internal Revenue

Service." Petition, at 4. This was a trial contention by MONY that the jury rejected. In fact, the jury found that it was MONY and the other defendants who had knowingly defrauded each of the respondents. That finding formed the basis of the fraud judgments against MONY.

3. Third, MONY misstates the FIA agents' insurance company affiliations. While Donald Fletcher was an insurance agent for MONY, he was also an insurance agent for Trans World Assurance Co. Some FIA agents were affiliated with MONY, some with TWA, and some simultaneously with both companies. Contrary to MONY's statements, not all FIA agents "signed an agreement to be exclusively a MONY agent." Many FIA representatives were never agents of MONY at all, underscoring that FIA was an entity distinct from MONY.

REASONS FOR DENYING THE PETITION

I. There Is No Split Among The Circuits On Any Issue Decided By The Court Below.

The facts of this case do not support the first question on which MONY seeks review. The Court of Appeals for the Sixth Circuit did not make any decision in this case which conflicts with a holding of another court of appeals. The question around which MONY has attempted to frame a conflict between the circuits is whether or not a parent corporation is sufficiently distinct from one of its corporate divisions, employees, or subsidiaries to be a separate "person" under 18 U.S.C.

§ 1962(c).[4] While the issue of "distinctness" between a parent corporation and its division, subsidiary, or employee may be a real question in some cases,[5] it does not exist here. The issue was not even raised at trial.

During that trial, MONY asserted that Fletcher was an independent contractor and that FIA was a business entity separate and apart from MONY.[6] MONY's position on appeal and in its Petition reflects an effort to reformulate its trial posture. MONY's current assertion – that FIA was a *de facto* division or part of MONY – is a factual

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[4] The court below recognized that, under 18 U.S.C. § 1962(c), the defendant "person" must be separate and distinct from the "enterprise" and found that the record supported the jury's finding of distinctness.

[5] *See, e.g., Lorenz v. CSX Corp.*, 1 F.3d 1406 (3d Cir. 1993)(possible for a defendant parent corporation to be a distinct entity from subsidiary "enterprise" but specific facts must be pled to show that the parent played a role in the racketeering activity distinct from its subsidiary's activity).

[6] FIA (including its predecessors-in-name) was also an entity separate and distinct from the person of Donald Fletcher, as the Sixth Circuit held in a related case involving this same scheme:

> Regardless of whether the activities of the Fletcher-McKelvie Group are characterized as being entirely criminal in nature or are only partially so, it was clearly an independent organization through which defendants sold life insurance policies to scores of clients across the country by enticing them with false claims that the clients could reduce or even eliminate their federal income tax liability. Given these circumstances, we find that the Fletcher-McKelvie Group constituted a separate RICO enterprise under any recognized definition of the statutory term.

Hofstetter v. Fletcher, 905 F.2d 897, 903 (6th Cir. 1988).

contention first raised during the appeal of this case as part of MONY's effort to avoid liability under RICO. This posture is foreign to the record.

There was abundant evidence in the record to support the properly-instructed jury's finding. The jury could have found that FIA was an entity distinct from MONY. That is the holding of the court of appeals, below. Similarly, under the trial court's instructions, the jury could have found the association-in-fact (among MONY, Fletcher, the tax preparers, FIA, and numerous other identified collaborators) as the enterprise. The jury's finding, the consequent judgment, and the holding affirming it do not create any conflict with any other court of appeals.

A. Congress Neither Excluded Corporations From Liability Under 18 U.S.C. § 1962(c) Nor Abrogated Basic Principles Of Agency.

The court below carefully analyzed the issue of whether principles of *respondeat superior* may apply in 18 U.S.C. § 1962(c) actions to hold a corporation liable for the acts of its agents. Following the holdings of numerous circuits, construing 18 U.S.C. § 1962(c), the court below recognized the near-unanimous rule in the courts of appeals "that plaintiffs may not use RICO to impose liability vicariously on corporate 'enterprises' because to do so would violate the distinctness requirement." That rule does not apply here because MONY was the defendant "person," not an alleged enterprise. As noted above, the Respondents presented abundant evidence at trial that the enterprise (FIA) was distinct and separate from

MONY, and that MONY actively promoted and sponsored the scheme and benefitted from it.

MONY contends that Congress intended to abolish vicarious liability *in toto* in § 1962(c) actions; the sought-for conclusion is that orporations are exempt from § 1962(c) liability. This is not an issue which this Court should address. When the courts of appeals' decisions are examined carefully, no court has endorsed the interpretation that MONY advocates.[7] Congress has given no indication in the statute that the standard rules of agency should be ignored in this case.

B. This Court Should Not Engage In A Fact-Finding Exercise To Impeach The Jury's Finding That MONY Participated In The Operation Or Management Of The Enterprise.

The properly-instructed jury, below, found that MONY had participated in the operation or management of the enterprise. The court below found "abundant evidence" that MONY had "actively promoted and sponsored the scheme and plainly benefitted" from its operation. MONY urges this Court to review the record and conclude that the jury erred in that finding. MONY

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[7] In *D&S Auto Parts, Inc. v. Schwartz*, 838 F.2d 964 (7th Cir.), *cert. denied*, 486 U.S. 1061, 108 S.Ct. 2833 (1988), the Court of Appeals for the Seventh Circuit suggested that *respondeat superior* principles do not apply to § 1962(c) actions. However, the Seventh Circuit later indicated that the *D&S* language was limited to cases where the RICO defendant ("person") is also named as the "enterprise." *Ashland Oil, Inc. v. Arnett*, 875 F.2d 1271, 1281 (7th Cir. 1989). *See also Brady v. Dairy Fresh Products Co.*, 974 F.2d 1149, 1154 (9th Cir. 1992).

also urges this Court to hold that the perpetrators of the instant scheme were "clearly outside their scope of authority as MONY agents" and that MONY's connection to the scheme was comparable to the accountants' role in *Reves v. Ernst & Young*, 113 S.Ct. 1163 (1993).

The large record in this case contains telling evidence that MONY, through executives at the highest level, investigated this scheme, found it to be illegal and a "fast-track hustle," and then knowingly embraced, funded and otherwise sponsored it. MONY participated in its management and operation of the enterprise through its Sales Manager, Donald Fletcher, and through its agency and regional vice-presidents. MONY's regional vice-president gave the "green light" to this operation in writing, and MONY's executives facilitated the operation of the scheme in numerous states. MONY ignored warnings from its own investigator, its own insurance agents, and its own policyholders about the illegalities of the scheme. MONY's executives took steps to issue threats to quiet any dissatisfaction with this program. The jury found that MONY acted intentionally and with malice. This extremely fact-based conclusion by the jury is not an issue of law that this Court should address.

II. This Court Should Not Review A Question Of Ohio Law On Which The Supreme Court Of Ohio Has Spoken Directly Merely On The Speculation That The Ohio Supreme Court Might Change Its Holding.

The Supreme Court of Ohio, in construing the Ohio Consumer Sales Practices Act, Ohio Rev. Code

§ 1345.09(F)(2), explicitly gave trial courts the discretion to enhance the lodestar attorney fees calculation based upon several enumerated factors. *Bittner v. Tri-County Toyota, Inc.*, 58 Ohio St. 3d 143, 145, 569 N.E.2d 464 (1991). The *Bittner* case directly addresses the issue of fee enhancement under the very statute under which the trial court used in awarding fees. To be sure, Ohio's approach, authorizing enhancement or reduction based on any or all the factors listed in Ohio's Code of Professional Responsibility, DR 2-106(B) (Appendix, A), differs both from this Court's latest and previous interpretations of various federal attorney fee award statutes. This Court has not relied upon the state attorney disciplinary rules to provide discretionary guidelines for attorney fee modifications. Nonetheless, Ohio is not required to move in lockstep with federal statutory interpretations. It is the prerogative of the Ohio Supreme Court to interpret Ohio's attorney fee award statutes.

The reasons that trial courts, interpreting Ohio law, are authorized to enhance attorney fees include those very reasons used by the district court, below, to support enhancement: (1) the contingent fee nature of the representation; and (2) the attorneys' inability to accept other cases. The highest court in Ohio has spoken directly to this enhancement issue, and it would be inappropriate for this Court to review the state-law-based decision based upon the suggestion that the Ohio Supreme Court might change the state's law.

CONCLUSION

For the reasons set forth above, Respondents submit that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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February 1994

APPENDIX

Ohio Supreme Court Rule IV(1) for the Government of the Bar

Code of Professional Responsibility, as adopted by the Supreme Court of Ohio, October 5, 1970

DR 2-106. FEES FOR LEGAL SERVICES

(A) A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee.

(B) A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee.

Factors to be considered as guides in determining the reasonableness of a fee include the following:

(1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.

(2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.

(3) The fee customarily charged in the locality for similar legal services.

(4) The amount involved and the results obtained.

(5) The time limitations imposed by the client or by the circumstances.

(6) The nature and length of the professional relationship with the client.

(7) The experience, reputation, and ability of the lawyer or lawyers performing the service.

(8) Whether the fee is fixed or contingent.

(C) A lawyer shall not enter into an arrangement for, charge, or collect a contingent fee for representing a defendant in a criminal case.